IN THE

Supreme Court of the United States

October Term 1978

No. ——

79-477

FIRST STATE BANK OF HUDSON COUNTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioner First State Bank of Hudson County respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 30, 1979.

OPINION BELOW

The opinion of the Court of Appeals, is reported at 599 F.2d 558. It is also reprinted in the Appendix hereto at page 24a. The opinion of the District Court for the District of New Jersey is not officially reported and appears in the Appendix at page 17a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 30, 1979. A timely petition

for rehearing *en banc* was denied on June 22, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Under the provisions of the Federal Tort Claims Act, 8 U.S.C. §1346(b), the United States is liable to the same extent as a private person "in accordance with the law of the place where the act or omission occurred." A federal bank examiner has discovered serious criminal conduct involving misapplication of bank funds, and false reporting to the bank's board of directors, and to the Federal Deposit Insurance Corporation (F.D.I.C.), but he fails to report these discoveries to the bank's board of directors. Following the institution of suit, the bank is not allowed discovery concerning the activities of the F.D.I.C. or its policies and procedures, and opposes the granting of summary judgment through two separate affidavits pursuant to *Rule* 56(f) due to an absence of essential materials. Under these circumstances the following questions are presented.

1. Are banks which are insured, regulated, and directly supervised by the F.D.I.C. within the class protected under the provisions of the Federal Deposit Insurance Act, 12 U.S.C. §§1811, *et seq.* so as to require the F.D.I.C. to inform a bank when it discovers criminal acts by the bank's personnel; and, even if these banks are not within that protected class, under what circumstances, if any, may the Federal Deposit Insurance Act be construed to exempt the United States from common law liability arising from the F.D.I.C.'s failure to inform the bank of its discoveries thereby creating an opportunity for the crimes to continue;

2. Ought a court to hold that there can be no duty under the F.D.I.C.'s *Manual of Examination Policies* on the basis that the *Manual* was not promulgated for the benefit of insured banks when the *Manual* itself directs that all discoveries of criminal activity be promptly reported to appropriate authorities including the bank's board of directors;

3. Ought a court to exempt the United States from all liability under the Federal Tort Claims Act for the failure of the F.D.I.C. to inform a bank that it has discovered the bank's personnel engaging in criminal activity by holding the bank's board of directors to be exclusively liable and responsible for the safety and soundness of the bank.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1346 United States as defendant subsection (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

United States Code, Title 12:

Chapter 16, Federal Deposit Insurance Corporation §§1811 through 1832.

Due to the length of the Federal Deposit Insurance Act, pertinent portions have been reprinted in the appendix to this petition beginning at page 1a.

STATEMENT OF THE CASE

The petitioner is a state chartered commercial bank now in liquidation. During its operations it was insured by the F.D.I.C. and was subject to that agency's supervision and regulation as a state chartered bank which was not a member of the federal reserve system.

On July 11, 1972 the F.D.I.C. dispatched one of its bank examiners to the bank to determine the extent of the bank's progress in resolving certain loan and credit matters which had recently been the subject of a report by the bank to the F.D.I.C. on June 20, 1972. This examiner's supervisory inquiry soon led to the discovery of a serious pattern of misapplication of bank funds by the bank's president and false reporting to the bank's board of directors and to the F.D.I.C. by that officer in order to conceal his criminal acts.

An F.D.I.C. report of the results of a regular bank examination, conducted earlier in 1972 and issued to the bank in June, had questioned certain loans and banking practices. The bank's board of directors responded to the F.D.I.C.'s report by adopting personnel and policy changes directed towards complying with the recommendations for its operations, and the board directed the bank's president to immediately reduce those loans and related lines of credit mentioned in the report by the F.D.I.C.

The criminal activity discovered by the F.D.I.C. bank examiner began during June of 1972 when the bank's president purportedly attempted to carry out the board's instructions to obtain reductions on certain loans and to reduce lines of credit. Finding himself unable to reduce the amounts outstanding on several major lines of credit, the bank's president contrived to conceal this from the board of directors. At the same time he embarked upon a plan to refinance the old loans with new extensions of credit. Many of these new loans were made without proper credit information or security in an effort to bail himself out of a difficult situation. Carefully disguising his activities from the bank's board of directors, the president continued his scheme which resulted in the ultimate loss of great sums of money.

When the board called for a reply to be sent to the F.D.I.C. on the progress in collecting the original loans in question, the president prepared an artfully contrived letter which revealed that these loans were being reduced or had already been paid off. What was not shown, however, was the new loans and other activities designed to present a favorable picture of the president's efforts. This reply was sent to the F.D.I.C. on June 20, 1972.

When the F.D.I.C.'s examiner came to the bank on July 11, and later on September 11 and 12, 1972, he had the benefit of the June 20th letter. When he checked the loan repayments and the new borrowings and extensions of credit, he uncovered the acts that the bank's president had committed in dealing with the matters questioned in the rgeular 1972 examination report. These included misapplication of funds and the issuing of false reports to the bank's board of directors and to the F.D.I.C.

There was nothing equivocal about these discoveries—they were clear and shocking. On July 12, and later on

September 13, 1972, the F.D.I.C. examiner made written reports of his discoveries to his superiors within the F.D.I.C. His visits to the bank were totally unannounced and the board of directors was never told of them. Nor was the bank ever notified of the examiner's discoveries or of the written reports which he made to his superiors. These were only discovered years later.

The essence of the petitioner's complaint is that the F.D.I.C. examiner failed in his obligation to promptly tell the bank's board of directors of his discoveries. The F.D.I.C. *Manual of Examination Policies* requires that such a report be made and it also directs that the examiner report his discoveries to his superiors. The latter was done immediately in this case; however, as to the bank, both the examiner and the F.D.I.C. stood mute for almost one year before the bank's board was advised of its president's activities. Had such a report been timely made, many of the losses which resulted from the president's criminal activities could have been averted. When finally uncloaked, the president was dismissed and subsequently pleaded guilty to federal charges involving the misapplication of bank funds.[1]

When it ultimately learned that the F.D.I.C. had uncovered the activities of its president at an early date but had failed to report them, the bank filed a claim under the provisions of the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, *et seq.* The present action followed upon the premise that the F.D.I.C breached its duty to the bank to report to it criminal activity which the agency discovered in the course of its supervisory activities. The

1. The bank's president pleaded guilty to a criminal information charging violations of 18 U.S.C. §371, Conspiracy to commit an offense against an agency of the United States, and 18 U.S.C. §656, Misapplication of funds by a bank official.

petitioner's complaint separately contended that liability should also be imposed under the common law of New Jersey concerning assumed duties and those which inexorably arise from the circumstance of discovery which imposes a certain standard of conduct as a matter of fairness and justice.

The District Court granted summary judgment on respondent's motion without allowing petitioner a continuance to obtain facts in discovery essential to its common law claims and necessary to resist documentary material submitted by the respondent in support of its motion. The District Court held that the F.D.I.C. owes no duty under any circumstances which would require it to report its discovery of ongoing criminal activity in a supervised bank to that bank's board of directors. Alternative grounds were cited by the District Court as warranting dismissal under the Federal Tort Claims Act, but they are not relevant here because the Court of Appeals specifically did not reach them in its opinion affirming the District Court's finding that no duty was owed to the bank.

REASONS FOR GRANTING THE WRIT

Point I

The decision below misconstrues the Federal Deposit Insurance Act when it interprets it as a bar to liability under the Federal Tort Claims Act.

At issue in this case is the question of whether the Federal Deposit Insurance Act requires the F.D.I.C. to report criminal activity discovered by it to the boards of directors of the banks which it insures and supervises. The Court of Appeals has taken the narrow view that the purpose of the Act in mandating the regulation and supervision of the nation's banks is to protect only the F.D.I.C. insurance fund, and that the preservation of the safety and stability of the nation's banks is not a primary goal of the Act. The insured banks and their depositors were held to be only "incidental" beneficiaries of the F.D.I.C.'s efforts to protect its insurance fund (Appendix, p. 30a).

Such a view ignores the fact that both the protection of the federal insurance fund and the protection and stability of banks are inseparable and congruent functions. The deposits insured by the F.D.I.C. are held by insured banks and the F.D.I.C. is obligated to pay claims for those deposits if the bank is unable to meet its obligations. Therefore, in order to protect the insurance fund, the F.D.I.C. must ensure that the deposits held by banks are protected. Numerous Congressional hearings indicate that Congress is very much concerned with preventing bank failures through early detection and reporting of criminal activity. [2]

2. On this point *see: Hearings on the Failure of the U.S. National Bank of San Diego Before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess., Nov. 27 at pp. 131-132 (1973), and before the same body in the 93d Cong., 2d

The Act itself is replete with references to criminal activity and the F.D.I.C. has been given broad powers to eliminate such activity from banks. See: 12 U.S.C. §1818(b)(1) at Appendix, p. 6a; 12 U.S.C. §1818(e)(1) at Appendix, p. 8a; 12 U.S.C. §1818(g)(1) at Appendix, p. 9a; and, 12 U.S.C. §1829 at Appendix, p. 16a. Moreover, Congress has imposed criminal sanctions for acts which threaten the safety and stability of banks. In construing those criminal statutes, numerous federal courts have held that a primary purpose of the Congress in establishing the federal system of regulation and insurance is the protection of individual banks and the banking system (see cases cited by the Court of Appeals in footnote 4, at Appendix, p. 30a).

In holding that there is no obligation upon the F.D.I.C. to inform a bank when it discovers serious criminal activity, the Court of Appeals has construed the statutory role of the F.D.I.C. so narrowly as to permit it to turn a blind eye upon threats to its own insurance fund and to ignore the violation of criminal statutes which the Congress has enacted for the protection of banks and the F.D.I.C. insurance fund.

So narrow is the holding that the Act has become a shield from liability under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, *et seq.* After first noting that

Sess., Dec. 12 at pp. 339 and 344 (1974). *See also: Hearings on the Failure of the Citizens State Bank of Carrizo Springs, Texas, and Related Financial Problems Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of the House Committee on Banking, Currency and Housing*, 94th Cong., 2d Sess. (1976); House Committee On Government Operations, Adequacy of the Office of the Comptroller to the Currency's Supervision of Franklin National Bank, H. R. Rep. No. 94-1669, 94th Cong., 2d Sess. (1976). Congress has also requested the General Accounting Office to investigate the conduct of the federal banking agencies including the F.D.I.C. Two significant reports have been sent to the Congress by the G.A.O. as a result of such requests: Federal Supervision of State and National Banks, Doc. No. OCG-77-1 (1977), and Supervision of Banks by the Federal Deposit Insurance Corporation Can Be More Efficient, Doc. No. FOD-77-8 (1977).

the petitioner's complaint raises disputed issues of fact from which a common law duty may arise (Appendix, pp. 32a-33a), the Court of Appeals, in the absence of a factual record, held that:

> "The F.D.I.C. did nothing more than perform its statutory duty of examination. In the performance of that duty, it assumed no special relationship to or control of the Bank which claims reliance on the expectation of notice of irregularities uncovered by that examination" (Appendix at pp. 34a-35a).

By holding that so long as the F.D.I.C. operates within the four corners of the statute there can be no duty imposed upon it by virtue of the common law of New Jersey, the Court of Appeals has turned the Tort Claims Act inside out. Consistent with the opinion of the Court of Appeals, federal bank examiners may ignore criminal acts which threaten the same fiscal integrity of the banks which they are charged with examining.

The decision is directly at odds with the Act's provisions making the United States liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). This Court has repeatedly held that it is the state tort law which controls liability under the Tort Claims Act, *e.g., Rayonier v. United States,* 352 U.S. 315 (1957), subject only to the specific limitations found in the Act. What the decision of the Court of Appeals has done is to create another exception to governmental liability, not found in the Tort Claims Act. Its effect is to pre-empt state tort law principals and exempt the government from liability for agency activities which fall within the agency's "statutory duties."

Such an exception to liability is neither proper nor desirable. This Court has said that "there is no justification

. . . to read exceptions into the Act beyond those provided by Congress." *Rayonier v. United States, supra.* Moreover, if the plain language of the Tort Claims Act making the United States liable as a private person is to have any meaning, it must be construed so that the governmental nature of the activity in question may not be raised as a bar to common law liability. [3]

Under New Jersey law a court would not look to the Federal Deposit Insurance Act in determining if a private person would be liable for his failure to disclose a discovery of serious criminal activity to a party over which he exercised supervisory power, authority and control. Where the F.D.I.C., or any like agency, discovers criminal acts and fails to report such discoveries, the evil wrought should be actionable under the Tort Claims Act when the clear failure of the government's agents to report discovered criminal activity is actionable under state law. There is nothing in either the Federal Deposit Insurance Act or the Federal Tort Claims Act to even suggest that a remedy should be denied under such circumstances. The Court should grant certiorari to ensure that the obligations and liabilities of federal agencies concerning the reporting of criminal activity discovered by them are properly established.

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3. Where it is deemed necessary to allow the government to accomplish its statutorily imposed goals unimpeded by tort liability, the exemption for discretionary functions and activity contained in 28 U.S.C. §2680(h) comes into play. However, even this section does not countenance negligence in carrying out such policies once they have been established. See: *Dalehite v. United States,* 346 U.S. 15 (1953).

Point II

The decision below erred in holding that the F.D.I.C. was under no obligation to follow its own *Manual of Examination Policies.*

The F.D.I.C.'s *Manual of Examination Policies* directs its examiners to report their discoveries of criminal activity to the bank's board of directors. The Court of Appeals construed certain reporting provisions of the *Manual* to be discretionary (Appendix at page 31a), but the discretion granted by the *Manual* itself is clearly limited to variations in reporting procedure. No basis can be found in the *Manual*, under any reasonable reading, which would justify the failure of an examiner to report the discovery of serious criminal activity to a bank's board of directors, or at least its senior officers not involved in the criminal activity.[4]

When an agency manual recognizes the importance of detecting and reporting criminal activity and sets up specific procedures and policies for its personnel in making

4. The Court of Appeals seized upon only the first sentence of a section of the F.D.I.C. *Manual* in determining that it could create no duty to report criminal violations discovered by bank examiners. [Appendix at p. 31a] The portion of the Manual in question is Section "W, III" and is entitled: "Procedure in Reporting Criminal Violations." The complete text of the relevant part of that section follows:

"A. *Notification to Directors.*

"Generally and where feasible, upon discovery of an apparent violation the Examiner should report it to the bank's Board of Directors. The Examiner's discussion with the Board should in all cases be limited to actual facts found by him during his investigation of the matter.

"The responsibility for the safe operation of a bank is vested in its directors. Therefore, it is important that the bank's board be advised promptly of any probable violation. However, the Examiner may use his discretion as to whether to convene the board immediately upon the discovery of the violation, or to defer convening the board until he has concluded the examination, or to instruct the senior officers to inform the board. This decision will depend primarily on the seriousness of the offense and its probable effect on the welfare of the bank. In any event, the senior executive officer, if not personally involved, should be informed immediately on discovery of an apparent violation."

such reports, the fact that the manual has not been formally promulgated under the Administrative Procedure Act, 5 U.S.C. §553, should not be determinative of the effect of such a manual on the agency's common law obligations. While the Court of Appeals acknowledged this point (Appendix at p. 31a), it went on to determine that the F.D.I.C. Manual could not bind the agency because "rights of individuals" are not affected by its provisions and that it was only concerned with "internal procedures and policies for insurance fund examinations" (Appendix at p. 32a).

Both holdings are unreasonably narrow and serve to preclude liability under the Federal Tort Claims Act no matter what an agency manual may direct, so long as the agency does not promulgate its manual as a rule. Since most agencies would have little reason to formally promulgate internal procedure manuals, the presence or absence of such a step is an inappropriate factor to be considered in determining the role of the manual in this case. The holding in *Chrysler Corp. v. Brown*, – U.S. –, 99 S. Ct. 1705, 47 U.S. L.W. 4434 (Apr. 18, 1979) relied upon by the Court of Appeals is clearly distinguishable because there the issue was whether the regulation had the force and effect of law. The issue in the present case is whether the F.D.I.C. has undertaken a duty to the bank.

A more appropriate inquiry would be the reasons for issuing such a manual, and the degree to which bank examiners are required to strictly adhere to the letter of its provisions. However, petitioner was denied discovery in this area and resisted summary judgment only by means of a *Rule* 56(f) affidavit (District Court Record, Item Nos. 20 and 40). By contrast, the respondent supported its motion with an affidavit from the Director of the F.D.I.C.'s Division of Bank Supervision stating that the purpose of

the Manual was merely to provide "general guidance"[5] (District Court Record, Item No. 41).

Merely because the *Manual* was not promulgated under the Administrative Procedure Act, the Court of Appeals should not have dismissed it as a basis for possible liability. In this regard the holding that the *Manual* can create no duty because "[i]n drafting the *Manual* the F.D.I.C. may be presumed to have aimed at the achievement of the statutory objective served by bank examinations" (Appendix at p. 32a), is particularly inappropriate. Such a holding constitutes an interpretation of the Federal Deposit Insurance Act as a blanket exception to liability under the Federal Tort Claims Act by preventing the assumption of any duty through the adoption and implementation of the *Manual*.

The effect and import of the *Manual* is a question of fact not susceptible to resolution as a purely legal issue. To approach it as a legal issue severely limits the liability of the United States in a manner not contemplated under the Federal Tort Claims Act. See *Rayonier v. United States*, 352 U.S. 315 (1957). Since the activities of many governmental agents are conducted pursuant to manuals which are not formally promulgated pursuant to the Administrative Procedure Act, the Court should grant certiorari to settle the manner in which such manuals should be considered in Tort Claims Act cases.

5. This affidavit seems to be in direct conflict with the holding in *Molevei v. Lindsey*, 289 F. Supp. 832 (E.D. Mich. 1968) which held the same F.D.I.C. Manual to be "the official declaration of the policies and procedures of the F.D.I.C." That holding was apparently based upon an affidavit from one of the previous Directors of the F.D.I.C.'s Division of Bank Supervision.

Point III

The decision below exempts the United States from liability by holding a bank's board of directors exclusively liable for any harm to an F.D.I.C. insured bank.

There is no proposition of New Jersey law which creates exclusive tort liability in this or any other case nor does the Federal Tort Claims Act exempt the United States from liability merely because the liabilities of other parties may be involved.

When the Court of Appeals held that "[t]he duty to discover fraud in their institutions is upon bank directors and they may not transfer it to the F.D.I.C. by the easy expedient of purchasing insurance protection from it" (Appendix at p. 31a), the implication was raised that this is a case where the bank's directors are seeking indemnity from the United States. *Cf.: Harmsen v. Smith*, 586 F.2d 156 (9 Cir. 1978). Such is not the case and the opinion of the Court of Appeals will have the opposite effect of making the directors the indemnitors of the F.D.I.C. regardless of the failure of that agency to protect its own insurance fund.[6] The petitioner has never alleged that the F.D.I.C. was under a duty to perform the obligations im-

6. Subsequent to the closing of the bank, the F.D.I.C. filed suit in the New Jersey Superior Court against all current and former members of the bank's board of directors seeking recovery of the monies paid from its insurance fund. (*F.D.I.C. v. Barrett, et al.*, Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-14507-76). In that action the F.D.I.C. sought dismissal of the director's counterclaims by arguing the position advanced and now adopted by the federal court that it has no duty whatsoever to the bank or to its directors to report the discovery of criminal activity. While the conduct of the state court action has been stayed pending the resolution of the case now before this Court, the Court of Appeals decision shielding the F.D.I.C. from the bank's claims will be used as a sword to recover the money lost from the insurance fund.

This result highlights the inseparability of the protection of banks from the protection of the insurance fund. It also puts the bank's directors in the

posed upon the bank's directors. The director's duty to "discover fraud", which was stressed by the Court of Appeals, is unrelated to the duty of the F.D.I.C. to report newly discovered criminal activities. Certainly, if a bank director had discovered the criminal acts of the bank's president, New Jersey law would impose a duty upon him to report his discoveries. The Court of Appeals specifically noted the existence of such a duty on the part of the directors of a bank (Appendix at p. 28a-29a).

Under the Tort Claims Act, if the duties of both the directors and the F.D.I.C. were the same, then clearly the F.D.I.C. would be exposed to liability. But the bank has never argued that the duties are identical and therefore the director's duty to "discover fraud" is not determinative of the F.D.I.C.'s duty to report it after it has been discovered.

The problem presented by the Court of Appeals' decision for the determination of the liability of federal supervisory agencies is analogous to the problems encountered in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955) where no private person could be found who was conducting the same activities as the governmental defendant so as to produce a state common law precedent for liability. See also *Rayonier v. United States,* 352 U.S. 315 (1957). The rule laid down by the Court in those cases was that the Federal Courts must apply the common law principals of the jurisdiction where the action arose.

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position of guarantors of the insurance fund without any reciprocal obligation on the part of the F.D.I.C.

The extent to which the F.D.I.C. looks to bank directors as a potential source from which to recover monies for the insurance fund is reflected in a request to the Congress from the then Chairman of the F.D.I.C. to pass legislation to "increase the direct liability of bank directors." *Hearings on Bank Failures, Regulatory Reform, and Financial Privacy, Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of the House Comm. on Banking, Currency and Housing,* 94th Cong., 1st Sess., Part 2, p. 1229 (July 21, 1975).

In the present case the Court of Appeals has not done this, but instead, has fashioned a precedent even more restrictive than that rejected in *Indian Towing* and *Rayonier, supra.* The basis for the Court's approach is a restrictive interpretation of the F.D.I.C. Act (Appendix at p. 31a) from which it fashions an exception to liability with no reference to or support in New Jersey law. The liability of a federal regulatory and supervisory agency must be decided on the same basis as other tort defendants and the Court should grant certiorari to insure the application of the proper standards to such agencies.

Even if it were to be established at a trial that the bank's directors had breached some duty owed to the bank, there would still remain factual questions concerning the activities of the F.D.I.C. and the application of the New Jersey common law principles to those facts.[7] However, the absence of those facts and common law precedents on point cannot justify the rejection of petitioner's claim upon the ground that state law excludes governmental liability. In *Rayonier v. United States, supra,* the Court rejected the proposition that there can be no governmental liability in the absence of analogous circumstances arising under state law, and there is clearly no doctrine in New Jersey law under which the negligence of one tortfeasor can exclude liability on the part of other tortfeasors as a matter of law.

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7. In support of its motion to dismiss in the District Court the respondent submitted documentary materials in support of an argument that the bank's directors were at fault for the bank's difficulties. The bank was denied access to discovery materials to refute these allegations and submitted affidavits under *Rule* 56(f) in opposition to the motion.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX

SELECTED PORTIONS OF THE FEDERAL DEPOSIT INSURANCE ACT

UNITED STATES CODE, TITLE 28
Chapter 16, Federal Deposit Insurance Corporation

§1811. Creation of Corporation; duties

There is created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation") which shall insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.

§1813. Definitions

As used in this chapter—

(a) The term "State bank" means any bank, banking association, trust company, savings bank, or other banking institution which is engaged in the business of receiving deposits, other than trust funds as herein defined, and which is incorporated under the laws of any State, any Territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, or which is operating under the Code of Law for the District of Columbia (except a national bank), and includes any unincorporated bank the deposits of which are insured on September 21, 1950, and the word "State" means any State of the United States, the District of Columbia, any Territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(b) The term "State member bank" means any State bank which is a member of the Federal Reserve System, and the term "State nonmember bank" means any State bank which is not a member of the Federal Reserve System.

(h) The term "insured bank" means any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this chapter; and the term "noninsured bank" means any bank the deposits of which are not so insured.

(q) The term "appropriate Federal banking agency" shall mean—

(1) the Comptroller of the Currency in the case of a national banking association, a District bank, or a Federal branch or agency of a foreign bank;

(2) the Board of Governors of the Federal Reserve System—

(A) in the case of a State member insured bank (except a District bank),

(B) in the case of any branch or agency of a foreign bank with respect to any provision of the Federal Reserve Act which is made applicable under the International Banking Act of 1978,

(C) in the case of any foreign bank which does not operate an insured branch,

(D) in the case of any agency or commercial lending company other than a Federal agency, and

(E) in the case of supervisory or regulatory proceedings arising from the authority given to the Board of Governors under section 3105(b)(1) of this title, including such proceedings under the Financial Institutions Supervisory Act, and

(3) the Federal Deposit Insurance Corporation in the case of a State nonmember insured Bank (except a District bank) or a foreign bank having an insured branch.

Under the rule set forth in this subsection, more than one agency may be an appropriate Federal banking agency

with respect to any given institution. For the purposes of subsections (b) through (n) of section 1818 of this title, the term "insured bank" shall be deemed to include any uninsured branch or agency of a foreign bank or any commercial lending company owned or controlled by a foreign bank.

§1815. Application of national, State and foreign branch nonmember banks for insured status—National and State nonmember banks; matters considered

(a) Subject to the provisions of this chapter, any national nonmember bank which is engaged in the business of receiving deposits, other than trust funds as herein defined, upon application by the bank and certification by the Comptroller of the Currency in the manner prescribed in subsection (b) of section 1814 of this title and any State nonmember bank, upon application to and examination by the Corporation and approval by the Board of Directors, may become an insured bank. Before approving the application of any such State nonmember bank, the Board of Directors shall give consideration to the factors enumerated in section 1816 of this title and shall determine, upon the basis of a thorough examination of such bank, that its assets in excess of its capital requirements are adequate to enable it to meet all of its liabilities to depositors and other creditors as shown by the books of the bank.

§1816. Factors considered in issuing certificate to do business

The factors to be enumerated in the certificate required under section 1814 of this title and to be considered by the Board of Directors under section 1815 of this title shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management,

the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this chapter.

§1818. Termination of status as insured bank—Notice by bank of intention; citation of bank for unsound practices or violations; hearings; judicial review

(a) Any insured bank (except a national member bank, a foreign bank having an insured branch which is a Federal branch, a foreign bank having an insured branch which is required to be insured under section 3104(a) or (b) of this title, or State member bank) may, upon not less than ninety days' written notice to the Corporation, terminate its status as an insured bank. Whenever the Board of Directors shall find that an insured bank or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such bank, or is in an unsafe or unsound condition to continue operations as an insured bank, or violated an applicable law, rule, regulation or order, or any condition imposed in writing by the Corporation in connection with the granting of any application or other request by the bank, or any written agreement entered into with the Corporation, the Board of Directors shall first give to the Comptroller of the Currency in the case of a national bank or a district bank, to the authority having supervision of the bank in the case of a State Bank, and to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof and shall give a copy thereof to the bank. Unless such correction shall be made within one hundred and twenty days, of such shorter period not less than twenty days fixed by the Corporation in any case where the Board of Directors in its discretion has determined that the insurance risk of the Corporation is unduly jeopardized, or fixed by the Comptroller of the

Currency in the case of a national bank, or the State authority in the case of a State bank, or Board of Governors of the Federal Reserve System in the case of a State member bank as the case may be, the Board of Directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the Board of Directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the Board of Directors shall make written findings which shall be conclusive. If the Board of Directors shall find that any unsafe or unsound practice or condition or violation specified in such statement has been established and has not been corrected within the time above prescribed in which to make such corrections, the Board of Directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank and termination of such status thereupon may be ordered. Any insured bank whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section. The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this subsection, the insured deposits of each depositor in the bank on the date of

such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

CEASE-AND-DESIST PROCEEDINGS

(b)(1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further to take affirmative action to correct the conditions resulting from any such violation or practice.

(c)(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices,

specified in the notice of charges served upon the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the bank or such director, officer, employee, agent, or other person to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order shall become effective upon service upon the bank or such director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the bank or such director, officer, employee, agent, or other person, until the effective date of such order.

SUSPENSION OR REMOVAL OF DIRECTOR OR OFFICER

(e)(1) Whenever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured bank has committed any violation of law, rule, or regulation or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice in connection with the bank, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and the agency determines that the bank has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty or that the director or office has received financial gain by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or one which demonstrates a willful or continuing disregard for the safety or soundness or the bank, the agency may serve upon such director or officer a written notice of its intention to remove him from office.

SUSPENSION OR REMOVAL OF DIRECTOR OR OFFICER CHARGED WITH FELONY

(g)(1) Whenever any director or officer of an insured bank, or other person participating in the conduct of the affairs of such bank, is charged in any information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank, by written notice served upon such director, officer, or other person, suspend him from office or prohibit him from further participation in any manner in the conduct of the affairs of the bank. A copy of such notice shall also be served upon the bank. Such suspension or prohibition

shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction with respect to such crime is entered against such director, officer, or other person, and at such time as such judgment is not subject to further appellate review, the agency may, if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank, issue and serve upon such director, officer, or other person an order removing him from office or prohibiting him from further participation in any manner in the conduct of the affairs of the bank except with the consent of the appropriate agency. A copy of such order shall also be served upon such bank, whereupon such director or officer shall cease to be a director or officer of such bank. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such director, officer, or other person from office or to prohibit further participation in bank affairs, pursuant to paragraph (1), (2), or (3) of subsection (e) of this section. Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) hereof unless terminated by the agency.

(j) Any director or officer, or former director or officer of an insured bank, or any other person, against whom there is outstanding and effective any notice or order (which is an order which has become final) served upon such director, officer, or other person under subsections (e)(3), (e)(4), or (g) of this section, and who (i) participates in any manner in the conduct of the affairs of the bank involved, or directly or indirectly solicits or procures, or transfers or attempts to transfer, or votes or attempts to vote, any proxies, consents, or authorizations in respect of any voting rights in such bank, or (ii) without the prior written approval of the appropriate Federal banking agency, votes for a director, serves or acts as a director, officer, or employee of any bank, shall upon conviction be fined not more than $5,000 or imprisoned for not more than one year, or both.

§1819. Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

First. To adopt and use a corporate seal.

Second. To have succession until dissolved by an Act of Congress.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any

suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

Fifth. To appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this chapter or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe, by its Board of Directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted.

Eighth. To make examinations of and to require information and reports from banks, as provided in this chapter.

Ninth. To act as receiver.

Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and

regulations has been expressly and exclusively granted to any other regulatory agency).

§1820. Administration of Corporation—Board of Directors; use of mails; cooperation with other Federal agencies

(a) The Board of Directors shall administer the affairs of the Corporation fairly and impartially and without discrimination. The Board of Directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid. The Corporation shall be entitled to the free use of the United States mails in the same manner as the executive departments of the Government. The Corporation with the consent of any Federal Reserve bank or of any board, commission, independent establishment, or executive department of the Government, including any field service thereof, may avail itself of the use of information, services, and facilities thereof in carrying out the provisions of this chapter.

APPOINTMENT OF EXAMINERS AND CLAIM AGENTS; POWERS AND DUTIES

(b) The Board of Directors shall appoint examiners who shall have power, on behalf of the Corporation, to examine any insured State non-member bank (except a District bank), any insured State branch of a foreign bank, any State branch of a foreign bank making application to become an insured bank, any State nonmember bank or other institution making application to become an insured bank, and any closed insured bank or branch, whenever in the judgment of the Board of Directors an examination of the bank is necessary. In addition to the examinations provided for in the preceding sentence, such examiners shall have like power to make a special examination of

any State member bank and any national bank, insured Federal branch of a foreign bank, or District bank, whenever in the judgment of the Board of Directors such special examination is necessary to determine the condition of any such bank for insurance purposes. In making examinations of insured banks, examiners appointed by the Corporation shall have power on behalf of the Corporation to make such examinations of the affairs of all affiliates of such banks as shall be necessary to disclose fully the relations between such banks and their affiliates and the effect of such relations upon such banks, and in the case of a foreign bank, a binding commitment by such bank to permit such examination to the extent determined by the Board of Directors to be necessary to carry out the purposes of this chapter shall be required as a condition to the insurance of any deposits. Each examiner shall have power to make a thorough examination of all of the affairs of the bank and its affiliates, and shall make a full and detailed report of the condition of the bank to the Corporation. The Board of Directors in like manner shall appoint claim agents who shall have power to investigate and examine all claims for insured deposits.

ADMINISTRATION OF OATHS AND AFFIRMATIONS; EVIDENCE; SUBPENA POWERS

(c) In connection with examinations of insured banks, State nonmember banks or other institutions making application to become insured banks, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, the appropriate Federal banking agency, or its designated representatives, are authorized to administer oaths and affirmations, and to examine and to take and preserve testimony under oath as to any matter in respect to the affairs or ownership of any such bank or institution or affiliate thereof,

and to exercise such other powers as are set forth in section 1818(n) of this title.

§1828. Regulations governing insured banks—Display of signs

BRANCH BANKS

(d)(1) No State nonmember insured bank (except a District bank) shall establish and operate any new domestic branch unless it shall have the prior written consent of the Corporation, and no State nonmember insured bank (except a District bank) shall move its main office or any such branch from one location to another without such consent. No foreign bank may move any insured branch from one location to another without such consent. The factors to be considered in granting or withholding the consent of the Corporation under this subsection shall be those enumerated in section 1816 of this title.

INDEMNITY INSURANCE

(e) The Corporation may require any insured bank to provide protection and indemnity against burglary, defalcation, and other similar insurable losses. Whenever any insured bank refuses to comply with any such requirement the Corporation may contract for such protection and indemnity and add the cost thereof to the assessment otherwise payable by such bank.

PUBLICATION OF REPORTS

(f) Whenever any insured bank (except a national bank or a District bank), after written notice of the recommendations of the Corporation based on a report of examination of such bank by an examiner of the Corporation, shall fail to comply with such recommendations

within one hundred and twenty days after such notice, the Corporation shall have the power, and is authorized, to publish only such part of such report of examination as relates to any recommendation not complied with: *Provided,* That notice of intention to make such publication shall be given to the bank at least ninety days before such publication is made.

§1829. Conditions governing employment of personnel

Except with the written consent of the Corporation, no person shall serve as a director, officer, or employee of an insured bank who has been convicted, or who is hereafter convicted, of any criminal offense involving dishonesty or a breach of trust. For each willful violation of this prohibition, the bank involved shall be subject to a penalty of not more than $100 for each day this prohibition is violated, which the Corporation may recover for its use.

OPINION OF THE UNITED STATES DISTRICT COURT

MEMORANDUM

RE: First State Bank of Hudson County v. United States, Civ. 76-1084

First State Bank of Hudson County (First State) sues the United States under the Federal Tort Claims Act, 28 U.S.C. § 2672, *et seq.* The claim is grounded on the proposition that in 1972 the Federal Deposit Insurance Corporation (FDIC) conducted an examination of the bank, with the report noting a number of exceptions. These included undue concentrations of credit (about 172% of total capital); insufficient or improperly documented or non-existent credit information on many borrowers; appraisal of collateral only at the inception of a loan with no report to the Board of Directors and no periodic review, appraisal and report; violations of both New Jersey banking statutes and FDIC regulations indicating a lack of knowledge on the part of active management, among others.

Active management of the bank's affairs was evidently in the hands of Mr. Edward Dooley, a Certified Public Accountant with no banking experience, who had founded the bank when it was first chartered by New Jersey in 1969.

After this adverse report was submitted to the First State board, it directed Dooley to respond, which he did by a letter outlining steps taken and to be taken to meet the exceptions.

Thereafter, an FDIC examiner, Mr. Spillane, made two follow-up visits to the bank and prepared reports to the New York Regional Director of FDIC dated July 12 and September 13, 1972. Plaintiff does not have these reports, and efforts to obtain them have been resisted on the ground that they are privileged as internal agency memos of an investigatory nature. As will appear, access to these documents has no effect on the outcome of the pending motions.

In any event, it is plaintiff's theory that on the follow-up visits, Spillane learned that Dooley had not taken the promised corrective steps, or had been engaged in misapplication of bank funds, or both, and that this information was not brought to the attention of the First State board. As a result, it is claimed, the bank failed in 1976. The New Jersey Commissioner of Banking stepped in and a New Jersey Superior Court receivership was initiated. In that receivership, the corporate entity of First State was allowed to retain and prosecute the present claim.

Alternatively, if examiner Spillane did not discover what Dooley's activities were, it is possible that he was negligent in conducting his follow-up visits as a result of which the corporate entity (i.e., shareholders) suffered damage.

The claim cannot prevail on either theory. In the first place, First State is a state-chartered bank. It is not a member of the Federal Reserve System. The primary function of regulation and supervision, therefore, is one to be carried out by the New Jersey Commissioner of Banking, not by the FDIC.

The function of FDIC is to support the stability and integrity of the banking system by providing insurance on the accounts of *depositors* (now at a limit of $40,000), but not to shareholders. This arrangement goes back to the supplement to the Federal Reserve Act, enacted June 16, 1933, 48 Stat. 168, which added section 12B, classified as 12 U.S.C.A. § 264. By the Act of September 21, 1950, section 12B of the Federal Reserve Act was withdrawn and made a separate Act, now classified as 12 U.S.C.A. §§ 1811 to 1832.

A reading of the Act as a whole makes clear that the legislative purpose of the FDIC authority to conduct examinations is to protect FDIC and the deposit insurance system against loss from undue risk. FDIC neither charters banks nor controls management. To protect itself against risks of loss, the FDIC board may suspend or remove a director or officer, it may issue temporary or permanent cease-and-desist orders, or it may terminate the insurance of deposits, 12 U.S.C. § 1818.

Thus, FDIC cannot be held to owe any duty, either expressly or by implication, to First State as a corporate entity or to the shareholders, and absent such a duty no recovery may be had under the Federal Tort Claims Act.

For this reason, it make no difference whether the FDIC examination and follow-up visits in fact turned up misconduct of Dooley which was not brought to the attention of the First State board, or whether they were performed so negligently as to fail to turn up the misconduct. In either case, absent any duty to First State, there cannot be a valid claim for recovery.

In fact, the responsibility to protect the corporate entity and its shareholders rests solely on the First State board. The 1972 Report on Examination, which that board did receive, set out exceptions of sufficient gravity as to put that board on notice. It had the authority, under N.S.S.A. (sic) 17:9A-253, 254, 255 and 256, to authorize a special examination of the bank's affairs. There is no allegation that it did so.

Beyond that, it is long established that bank examinations, by whomever conducted, do not purport to amount to complete audits. Their main focus is on compliance with statutory requirements. For a thorough discussion of the subject, see *Social Security Adm'n, Baltimore F.C.U. v. United States*, 138 F. Supp. 639 (D.Md., 1956)

Independently of the above reasoning, it is also clear that if there were a duty, its breach as alleged would amount to a claim of implied misrepresentation. That is to say, it amounts to a claim that the First State board was falsely misled to the impression or belief that the excep-

tions had been satisfied, since FDIC took none of the steps it had authority to take, such as suspension or removal of Dooley, or entry of a temporary or permanent cease-and-desist order, or a hearing to terminate the deposit insurance.

On this basis, the claims cannot stand because the Congress has excluded claims grounded on misrepresentation (whether actual or implied) by 28 U.S.C.A. § 2680(h).

To the extent that the steps of suspension or removal, entry of cease-and-desist orders or termination of deposit insurance were not taken, the claim is also barred because these are discretionary steps, 28 U.S.C.A. § 2680(a).

If it be argued that the claim has some contractual basis, the amount involved is beyond this court's jurisdiction and is in the exclusive jurisdiction of the Court of Claims, 28 U.S.C. §§ 1346(a)(2), and 1491.

Decisions on the subject as a whole are relatively few, and most deal with other agencies. For the benefit of the parties, the following rulings are noted:

Magellsen v. FDIC, 341 F. Supp. 1031 (D-Mont., 1972); *FDIC v. Glickman,* 450 F.2d 416 (CA-9, 1971); *United States v. Thompson,* 293 F. Supp. 1307 (D-Ark., 1967); *Newberg v. FSLIC,* 317 F. Supp. 1104 (D-Ill., 1970); *Moon v. Takisaki,* 501 F.2d 239 (CA-9, 1974); *United States v. Neustadt,* 366 U.S. 696 (1961); *Davis v. FDIC,* 369 F. Supp, 277 (D-Colo., 1974); *Falconi v. FDIC,* 257 F.2d 287 (CA-3, 1958); *Freeling v. FDIC,* 221 F. Supp. 955 (D-Okla., 1962), *aff'd,* 326 F.2d 971 (CA-10, 1963).

Finally, even if there were a valid claim despite all of these obstacles, the Court would be obliged to dismiss the complaint because it is clear that the administrative claim, which is a precondition to suit under the Federal Tort

Claims Act, was not filed within two years, 28 U.S.C.A. § 2401(a). That claim was filed April 9, 1976. The critical date is, therefore, April 9, 1974.

Yet, it is a fact not in dispute that when the 1973 examination was conducted by both New Jersey and FDIC, the nature and extent of Dooley's criminal, illegal and unauthorized practices were brought to light and called to the attention of First State's board no later than July 19, 1973, and the board then fired Dooley.

The fact that the New Jersey Commissioner of Banking and FDIC were indulgent and considerate in allowing another three years to give First State every opportunity to put its affairs in order cannot be a basis for tolling the two-year filing requirement. The administrative claim was filed too late and so the present action cannot stand for that reason alone.

To make certain that First State had every opportunity to advance and support its claim, the Court undertook a laborious examination *in camera* of discovery materials subject to claims of privilege. Having done so, the Court finds that the basis for its ruling renders all these questions moot since access to the privileged materials would not affect this result.

Finally, so that the record may be complete, the application of the United States to amend its answer to the amended complaint will be granted.

/s/ Vincent P. Biunno, USDJ

DATED: June 2, 1978.

Original to Clerk for filing.

Copies to: Donald Volkert, Assistant United States Attorney; Daniel E. Horgan, Esq., 32 Journal Square, Jersey City, N.J. 07306.

ORDER AND FINAL JUDGMENT

For the reasons stated in the Memorandum of even date, it is on this 2nd day of June, 1978,

ORDERED that:

1. Leave be granted to defendant to file its Amended answer to the Amended Complaint;

2. Final judgment dismissing the complaint with prejudice is entered in favor of defendant and against plaintiff.

3. All other pending motions are moot.

/s/ Vincent P. Biunno,

VINCENT P. BIUNNO,
United States District Judge.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-2013

FIRST STATE BANK OF HUDSON COUNTY,
Appellant

v.

THE UNITED STATES OF AMERICA

Appeal From the United States District Court
for the District of New Jersey

D.C. Civil No. 76-1084

Argued March 21, 1979

Before Seitz, *Chief Judge,* Aldisert and Rosenn, *Circuit Judges*

(Opinion filed May 30, 1979)

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OPINION OF THE UNITED STATES COURT OF APPEALS

ROSENN, *Circuit Judge*

On June 14, 1976, the New Jersey Commissioner of Banking closed the doors and seized the assets of the First State Bank of Hudson County (the "Bank"), a commercial institution chartered under the laws of New Jersey, whose deposits were insured by the Federal Deposit Insurance Corporation ("FDIC"). Alleging that in the course of a bank examination the FDIC had discovered that the Bank's president was engaging in serious criminal violations involving the misapplication of bank funds but that the FDIC had negligently failed to report such discovery to the Bank, the Bank brought an action against the United States to recover damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§2671 et seq. (1976). Because we believe the FDIC, under the circumstances of this case, owed no duty to warn the Bank, we affirm the judgment for the defendant.

I.

The Bank began business in December 1969. In September 1970, Edward P. Dooley ("Dooley"), whose subsequent misconduct would contribute to the Bank's downfall, became president. In the autumn of 1971, the Bank applied for approval to open a new branch and this application occasioned a routine investigation by the FDIC. That investigation, which the FDIC began in February 1972, uncovered some questionable operations by the Bank.

In a report to the Bank, sent on June 1, 1972, the FDIC observed a "failure on the part of the active management to adhere to banking principles and related laws and regulations." The FDIC noted that a large portion of the Bank's loans were in arrears, that the Bank maintained insufficient credit information, that loans exceeded statutory lending limits and were improperly concentrated in

a few borrowers, and that the Bank was lax in its internal controls. The FDIC urged "that effective action be taken to improve the unsatisfactory conditions noted." The report further detailed violations of New Jersey's banking statutes and FDIC regulations and urged that effective action be taken as quickly as possible. Replying by letter to the FDIC on June 20, the Bank declared that it was taking steps to correct these problems. According to the Bank's complaint in the instant suit, this reply went to the FDIC over this signature of the secretary of the board of directors but had actually been prepared by Dooley. As the complaint alleges, the reply "contained willfully false information and deliberately concealed material facts known at the time only to Dooley."

The FDIC allegedly undertook a further investigation on July 11, 1972, without the Bank's knowledge, to verify the paydowns reported by the Bank in its letter of June 20. The examiner, Thomas J. Spillane ("Spillane"), is asserted to have made a second examination on September 11 and 12. While conducting these examinations, Spillane allegedly discovered that Dooley, in violation of law, was giving the FDIC false statements about the Bank's operations. He did not inform the bank of this discovery. On October 20, 1972, the Bank sent a second letter to the FDIC, which again affirmed that it was reforming its practices, but which the Bank asserts in its complaint contained willfully false information and deliberately concealed facts. The FDIC acknowledged this letter and requested further information. The Bank replied with another letter dated October 30, 1972, which it also characterizes as containing willfully false statements and misleading information.[1]

1. A New Jersey State bank examiner also made an examination of the Bank as of the close of business on February 25, 1972. On July 26, 1972, eight directors of the Bank attended a meeting with officials of the State Banking Department and the FDIC regional director. The February 25, 1972, examination report was discussed. By letter dated August 3, 1972, to

On July 19, 1973, after the FDIC had evidently informed the Bank more specifically about its president's misdeeds, the Bank summarily dismissed Dooley. Dooley later pleaded guilty to charges that he had misapplied funds of a bank insured by the FDIC. 18 U.S.C. §§2, 371 & 656 (1976). As the Bank alleges, it first learned in February 1976 that Spillane had discovered Dooley's misapplication of funds in July 1972 and that the FDIC had not immediately shared its knowledge with the Bank. Having first exhausted its administrative remedies, the Bank then filed a complaint against the United States, in which it asserted a cause of action under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-80 (1976).

The Bank sought to recover from the United States for damages caused by Dooley between July 11, 1972, and July 19, 1973—when Dooley was discharged. The Bank contended that the FDIC had breached a duty to inform it of Dooley's misapplication of funds. Although the Bank argued that Spillane had actual knowledge of Dooley's crime, it alternatively pleaded that Spillane had failed to discover the malfeasance, and thus had violated the standard of due care. After the filing of this complaint, the Banking Commissioner of New Jersey seized the Bank's business and assets, which are now being liquidated. With the approval of the Superior Court of New Jersey, the Commissioner allowed the management of the Bank to prosecute this suit.

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the Bank's board of directors, Andrew J. Kerns, New Jersey's chief bank examiner, summarized the July 26 meeting, the review of the January examination report, the significant problems facing the bank, and the lack of managerial control and supervision. Recommendations were specifically made and attention was directed to "the large number of [statutory] violations cited." The letter noted, *inter alia*, that "[t]he poor quality of your internal operations, systems, and controls was the subject of comment and also somewhat distressing . . ."and replies were requested, including the remedial action to be taken for each exception scheduled.

The United States moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) & (6) for lack of jurisdiction over the subject matter and for failure to state a claim, asserting the following reasons:

(1) The alleged negligence did not constitute a breach of any duty owed to the plaintiff;

(2) The plaintiff's claim is excepted by the Federal Tort Claims Act because it arises from the exercise or performance of a discretionary function and an alleged misrepresentation, 28 U.S.C. §2680 (a) and (h); and

(3) The claim was not presented in writing to FDIC within two years after it accrued and it is therefore barred under 28 U.S.C. §2401(b).

The district court granted the motion. Because the district court considered documentary evidence outside the pleadings, such as the FDIC Report on Examination, we treat the district court's action as a grant of summary judgment under Fed. R. Civ. P. 56. *Dindo v. Whitney*, 451 F.2d 1, 2 (1st Cir. 1971). *See also Hubicki v. ACF Industries, Inc.*, 484 F.2d 519, 523 (3d Cir. 1973).

II.

The district court concluded that the FDIC could not be held to owe any duty, either express or implied, to the bank or to its shareholders. It reasoned that the duty to protect the corporate entity and its shareholders rested solely on the Bank's board of directors and that the 1972 Report on Examination by the FDIC put the Board on notice of the gravity of the Bank's affairs. The court also held that even if there were a duty by the FDIC to the Bank, the claims were barred by the misrepresentation (28 U.S.C. §2680(h)) and the discretionary function (28 U.S.C. §2680(a)) exceptions to the Federal Tort Claims Act, and by the statute of limitations, 28 U.S.C. §2401(b).

The Federal Tort Claims Act permits suit against the United States

> . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1346(b) (1976). The Bank must therefore show that the officials of the FDIC, if private persons, would have been liable to it under the law of New Jersey. *See Fisher v. United States,* 441 F.2d 1288, 1289 (3d Cir. 1971). There can be no liability unless, under New Jersey law, the officials of the FDIC would owe a duty to the Bank.

The Bank suggests three possible sources of a duty owed to it by the FDIC: (1) the statute creating the FDIC and mandating its supervisory and regulatory role over banks insured by it; (2) the FDIC Manual of Examination Policies; and (3) the FDIC's assumption of a supervisory role over the bank. After carefully reviewing the Bank's contentions as to the duty owed to it, we conclude that no duty arose from these sources, either separately or together.

New Jersey law instead places a duty of supervision upon each bank's board of directors. A New Jersey statute requires that the director of a bank must

> take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of the bank, and that he will not knowingly violate, or knowingly permit to be violated, any provision of this act . . . .

N.J. Stat. Ann. §17:9A-103(B) (West Supp. 1979). It is, moreover, a general principle of banking law that "[i]f, through recklessness and inattention to the duties confided to him, frauds and misconduct are perpetrated by other officers and agents or codirectors, which ordinary care on his part would have prevented, [a director of a bank] is personally liable for the loss resulting." 1 Michie on Banks and Banking, ch. 3, §63 (1973) (footnote omitted).

The Federal Deposit Insurance Act, 12 U.S.C. §§1811 et seq. (1976), as amended by Pub. L. 95-630, 92 Stat. 3641 (1978) (the "Act"), sets up a system of insurance, the primary function of which is "stabilizing or promoting the stability of banks." *Doherty v. United States,* 94 F.2d 495, 497 (8th Cir.), *cert. denied,* 303 U.S. 658 (1938); *Fed. Deposit Ins. Corp. v. Godshall,* 558 F.2d 220, 221 (4th Cir. 1977). The purpose of the bank examinations by the FDIC under 12 U.S.C. §1820(b) is to prevent losses that would result in claims against the insurance fund. Nothing in the Act purports to establish any duty requiring that the FDIC warn banks of irregularities perpetrated by their officials. When the FDIC carried out its responsibilities under the Act by examining the Bank, its purpose was to safeguard this system of insurance,[2] and not as the plaintiff contends, to fulfill an obligation to notify the insured bank of any unlawful banking practice of bank officials.

The FDIC was not acting for the benefit of the Bank or even of the Bank's depositors and other creditors. If bank examinations by the FDIC reveal any irregularities or fraud, such examinations, though they may inure incidentally to the benefit of a bank, are intended primarily for the protection of the insurance fund. As the Senate Re-

2. The duties of the FDIC as set forth in the statute are as follows: "There is created a Federal Deposit Insurance Corporation, which shall insure as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this chapter . . . ." 12 U.S.C. § 1811.

port on an amendment to the Act observed, the FDIC's "supervisory responsibilities relate to specific types of actions which have a direct bearing upon its role as insurer." S. Rep. No. 1821, 86th Cong. 2nd Sess. (1960), *reprinted in* [1960] U.S. Code Cong. & Ad. News 3234, 3236.[3] *Cf. Harmsen v. Smith*, 586 F.2d 156, 157 (9th Cir. 1978) (in suit based on the National Bank Act, the court writes that "[a]lthough bank examinations may reveal irregularities and even fraud, which discoveries may redound to the benefit of innocent persons, including stockholders, that result is merely an incidental benefit to the examined banks").

None of the cases cited by the Bank supports its primary premise that bank examinations under the Act were intended to ring the alarm bell to arouse drowsy directors and misguided stockholders.[4] The Bank's reliance on *Deitrick v. Greaney*, 309 U.S. 190 (1940), is also misplaced. The suit in *Deitrick* was based on the National Banking

3. Although a subsequent Congress cannot speak for the intent of the Congress that passed an act, the later expressions found in a legislative history may carry some weight. GTE Sylvania v. Consumer Products Safety Commission, No. 78-1328 (3d Cir. Apr. 30, 1979) typescript at 27, 37.

The Bank invokes a passage from the legislative history of the 1966 amendments to the Act. The Senate Report on the amendments announced that the bill would give the FDIC and other agencies "authority to issue cease-and-desist orders or suspension or removal orders subject to standards and procedures designed to protect both the institutions involved and their officials and the depositors, savers, and others interested in the sound and effective operations of the financial institutions." S. Rep. No. 1482, 89th Cong. 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Ad. News 3532, 3533. In the next sentence, however, the Report indicates that these powers serve a larger purpose—the prevention of "harmful consequences to the growth and development of the Nation's economy." Nothing in the passage negatives the conclusion that the bank examinations, in uncovering illegal or fraudulent conduct, afford the banks only incidental benefits.

4. Westfall v. United States, 274 U.S. 256, 258 (1927); Weir v. United States, 92 F.2d 634, 636 (7th Cir.), *cert. denied*, 302 U.S. 761 (1937); Doherty v. United States, 94 F.2d 485, 497 (8th Cir. 1959); Garret v. United States, 396 F.2d 489, 491 (5th Cir.), *cert. denied*, 393 U.S. 952 (1968); United States v. Wilson, 500 F.2d 715, 720 (5th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975). *See also* FDIC v. Godshall, 558 F.2d 220, 221 (4th Cir. 1977); Freeling v. FDIC, 221 F. Supp. 955, 957 (W.D. Okla. 1962), *aff'd per curiam* 327 F.2d 971 (10th Cir. 1963).

Act, not the Federal Deposit Insurance Act, and merely concerned a claim on a promissory note given to the bank in that case by one of its directors as a substitute for shares of its own stock illegally purchased and retained by that bank. We hold that the Federal Deposit Insurance Act imposes no duty on the FDIC to warn the officers and directors of a bank about wrongdoing committed by one of its officials and discovered by the FDIC. The duty to discover fraud in their institutions is upon bank directors and they may not transfer it to the FDIC by the easy expedient of purchasing insurance protection from it.

The Bank also struggles in an energetic effort to comb a duty to it from the FDIC Manual of Examination Policies. This Manual, provided by the FDIC to its examiners, states, ***inter alia***, that "[g]enerally and where feasible, upon discovery of an apparent violation the Examiner should report it to the bank's Board of Directors." Arguing that the Manual is a regulation with the force of law, the Bank contends that the Manual established Spillane's duty to warn the directors about Dooley's misapplication of funds.

The FDIC did not issue the Manual as a substantive rule, the promulgation of which would have required notice and comment under the Administrative Procedure Act, 5 U.S.C. §553 (1976). The Manual therefore does not have the force of law. *See Chrysler Corp. v. Brown*, 47 U.S.L.W. 4434, 4440 (April 18, 1979). It might nevertheless be argued that the Manual, although not issued as a substantive rule, could create a duty owed by an FDIC examiner to an examined bank, the violation of which might support an action under the Federal Tort Claims Act. *Cf. Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (with regard to internal manual of Bureau of Indian Affairs, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures"). But

under the circumstances of this case, we hold that a manual setting up internal procedures and policies for insurance fund examinations does not create a right in the examined bank to require notice from the FDIC of irregular banking practices by its officials. In drafting the Manual, the FDIC may be presumed to have aimed at the achievement of the statutory objective served by bank examinations. As we have previously noted, Congress intended the examinations to be a valuable means of protecting the important interests of the federal insurance fund, not a direct measure to protect the banks from the misconduct and shortcomings of their officials and employees.[5] The Bank, therefore, cannot predicate a claim on the alleged violation of the FDIC Manual which was issued only for internal operating purposes. *Cf. Griffin v. United States,* 500 F.2d 1059, 1070 (3d Cir. 1974) (suit under Federal Tort Claims Act lies if plaintiff comes within protections afforded by federal regulations); *Braitman v. Overlook Terrace Corp.,* 68 N.J. 368, 346 A.2d 76, 86 (1975) (under New Jersey law, suit lies when plaintiff is within class protected by state regulation).

The Bank submits, finally, that New Jersey would recognize an assumed duty of the FDIC to the Bank—a duty arising from the supervisory role allegedly undertaken by the FDIC. At the very least, the Bank argues, its contention about an assumed duty raises a disputed issue of fact, which the district court should not have decided either through dismissal of the complaint or through summary judgment.

On the Bank's theory, the FDIC foresaw, or alternatively should have foreseen, the criminal conduct that ultimately wrought havoc on the Bank. Therefore, the Bank

5. Because the Manual does not create rights in the banks, we need not reach the Bank's argument that the Manual left no discretion in the examiner to withhold warnings about Dooley's wrongdoing.

asserts that the FDIC is liable under section 302B or section 448 of the Restatement (Second) of Torts (1965), both of which sections concern the liability of defendants who could have foreseen the unreasonably risky conduct of third persons. As the Bank acknowledges, however, New Jersey law does not construct a duty from prescience alone. Liability depends upon some independent duty owed by a party to another. *Goldberg v. Newark Housing Authority,* 38 N.J. 578, 186 A.2d 291 (1962).[6] In an effort to find an independent duty in its behalf, the Bank focuses upon section 323 of the Restatement (Second) of Torts (1965) and looks for support in our decision in *Toole v. United States,* 588 F.2d 403 (3d Cir. 1978).

Section 323 of the Restatement contemplates liability when a person undertakes to render services to another and fails to exercise reasonable care in his performance:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

According to the Bank, the FDIC gratuitously undertook to supervise insured banks and is liable for its dereliction in the performance of that undertaking. The Bank cites case authority from New Jersey to support its argument

6. We do not mean to imply that, under sections 302B and 448, the Restatement omits a requirement of an independent duty. *See* Restatement (Second) of Torts § 302, comments "a" & "b"; *id.* § 448 (concerning only superseding causes).

that a volunteer is liable for the faulty execution of a gratuitous undertaking to assist another. *Freddi-Gail, Inc. v. Royal Holding Corp.*, 45 N.J. Super. 516, 133 A.2d 362 (1957). *See also Bauer v. 141-149 Cedar Lane Holding Co.*, 24 N.J. 139, 130 A.2d 833 (1957).[7]

We perceive little substance in the Bank's contention that the FDIC was performing "services" which it should have recognized as "necessary for the protection of the [Bank's] person or things." As long as the FDIC did no more than carry out its statutory responsibility to examine the Bank for insurance purposes, neither the FDIC nor the Bank could reasonably have believed that the agency assumed a duty to warn the Bank's board of the derelictions of their president and employee. Neither of the parties had any reasonable expectation that the FDIC was monitoring the conduct of bank employees out of any obligation, either statutory or assumed, to protect the bank. The examinations by the FDIC should not have been seen as "services" to the Bank.[8]

The Bank argues that its allegations about the FDIC's supervisory role raised an issue of fact that the district court ought to have left for determination at a trial. But the complaint alleges nothing more than (a) the failure to report to the Bank crimes that an FDIC examiner had uncovered in the ordinary course of his duties, and (b) examinations that led to a continuing exchange of letters about the Bank's questionable financial practices. The FDIC did nothing more than perform its statutory duty

7. We need not determine the exact contours of this doctrine under New Jersey law. It appears that New Jersey law, though following the same principle as the Restatement, may not be in complete accord with section 323. *See* Bauer v. 141-149 Cedar Lane Holding Co., 24 N.J. 139, 130 A.2d 833, 839 (1957) (increased risk or reliance by plaintiff to be considered, but not "controlling" in determination of reasonableness). We also do not decide whether New Jersey courts would extend the principle of section 323 beyond "physical harm" in order to reach the kind of injury involved in this case.

8. Although the Bank alleges that the FDIC assumed a supervisory role, it does not argue for the FDIC's liability upon analogy with cases holding an insurer liable to employees of an insured corporation for negligence in inspections aimed at the discovery of physical danger. *See, e.g.*, Mays v. Liberty Mutual Ins. Co., 323 F.2d 174, 175-76 (3d Cir. 1973) (Pennsylvania law). We therefore do not reach this issue.

of examination. In the performance of that duty, it assumed no special relationship to or control of the Bank which claims reliance on the expectation of notice of irregularities uncovered by that examination.

Nor does *Toole v. United States*, *supra*, recognize any duty that the Bank can invoke in this case. In *Toole*, this court held the United States liable according to Pennsylvania law as the employer of an independent contractor because the Government assumed a duty toward the contractor's employees when the contract demanded peculiarly hazardous employment in the production of munitions. Just as the Bank alleges that the FDIC examiner had actual knowledge of Dooley's crimes, so in *Toole* a government inspector had actual knowledge of a danger and failed to give warning. But the holding in *Toole* is expressly limited to a prediction of Pennsylvania law concerning "extraordinarily dangerous" or "ultrahazardous" activities, such as the manufacture of explosives by the employer's contractor. 588 F.2d at 406, 408. Because no such situation is present here, *Toole* affords no support to the Bank's case.

III.

Because we hold that the district court correctly decided that the FDIC owed no duty to the Bank, we do not reach the district court's alternative holdings that even if there were a duty to the Bank, the claims were barred by the misrepresentation and discretionary function exceptions to the Federal Tort Claims Act, and by the statute of limitations.

The judgment of the district court will be affirmed. Costs taxed against appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

Present: SEITZ, *Chief Judge,* ALDISERT and ROSENN, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 21, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 2, 1978, be, and the same is hereby affirmed, with costs taxed against appellant.

Attest:

/s/ Thomas F. Quinn
Clerk

May 30, 1979

ORDER DENYING PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Rosenn
Judge

Dated: June 22, 1979